STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellant, v HAROLD R. WEAVER and CLARA WEAVER, Husband and Wife, and CLARA WEAVER TRUST, HAROLD R. WEAVER TRUST, and HAROLD R. and CLARA WEAVER CHARITABLE REMAINDER UNITRUST, under a trust agreement dated December 31, 1998, Defendants-Appellees.	UNPUBLISHED June 27, 2006 Nos. 257798 & 257799 Kent Circuit Court LC Nos. 00-10127-CC & 00-10128-CC
MICHIGAN DEPARTMENT OF TRANSPORTATION, Plaintiff-Appellee, v HAROLD R. WEAVER and CLARA WEAVER, Husband and Wife, and CLARA WEAVER TRUST, HAROLD R. WEAVER TRUST, and HAROLD R. and CLARA WEAVER CHARITABLE REMAINDER UNITRUST, under a trust agreement dated December 31, 1998, Defendants-Appellants.	Nos. 258087 & 258088 Kent Circuit Court LC Nos. 00-10127-CC & 00-10128-CC

Before: Owens, P.J., and Saad and Fort Hood, JJ.

SAAD, J, (*dissenting).*

I respectfully dissent. It is error as a matter of law to use the "subdivision development method" to value what the majority concedes is "vacant, undeveloped land." *In re City of Detroit (City of Detroit v Hartner)*, 227 Mich 132; 198 NW 839 (1924). As a matter of law, it is

reversible error to allow speculative, *in futuro* evidence of "what a speculator might be able to realize out of a resale in the future." *Id*. at 139, quoting *Penn SVR Co v Cleary*, 125 Pa 442, 452; 17 Atl 468 (1889). Rather, the only permissible evidence regarding just compensation for vacant, undeveloped land is "what a present purchaser would be willing to pay for it in the condition it is now in." *Id*.

Thus, if, as here, there are no comparable sales in the same area, to establish market value, the rule of *Detroit v Hartner* applies and evidence of what prospective buyers would be willing to pay at the date of condemnation is appropriate. However, it is impermissibly speculative to allow evidence of what a developer might profit after years of developing a subdivision, with speculative hypotheses about costs, returns and the timing of sales of the subdivided lots. Accordingly, evidence of "backed out," theoretical costs and hypothetical proceeds under the subdivision development method, also called the income approach or discounted cash flow method, is not relevant or reliable to establish the true market value of non-income-producing, vacant land in a condemnation case.

In *Hartner*, our Supreme Court cited with approval the following statement of the law regarding evaluation of vacant, undeveloped land:

> "It is proper to consider for what purpose it may be used to advantage, in order to determine for what price it will sell. It may be saleable as a site for the erection of a hotel, a factory, a dwelling, or a wharf, but it is not proper to lay before the jury proof of what the hotel or other structure would cost, together with proof of the value of the lot with such structure upon it, and treat the difference between these sums as the value of the lot. Such a method would be speculative and fanciful. Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted, but it is the tract, and not the lots into which it might be divided, that is to be valued. * * *
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> "The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. A speculator or investor in deciding what price he, could afford to pay, would consider the chances and probabilities of the situation as then actually existing. A jury should do the same thing. They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. This is a rule that is well settled and the court should have drawn the attention of the jury to it so as to have left no room for uncertainty on their part. They should have been told that they had nothing to do with the subdivision of this tract, the price of the lots or the probability of their sale; but that they were to ascertain the fair selling value of the land before and after the entry by the railroad company, in order to determine the actual damage done to its owner." [*Id*. at 138-139, quoting *Penn SVR Co* at 451-452.]

The very evidence used here was held to be inappropriate in *Hartner*. Today, this impermissible method to forecast the value of vacant, undeveloped land by hypothesizing a future subdivision

with homes on developed lots is called the "subdivision development method." Because the rule announced in *Hartner* over 60 years ago remains good law and represents sound reasoning, I would reverse and remand with instructions to follow its prescription regarding evidence of the value of undeveloped property.

/s/ Henry William Saad